IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 23886-5-III**
Respondent,	)	
	)	**Division Three**
v.	)	
JEROME E. GRIMES,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	

SCHULTHEIS, A.C.J. — Jerome Edwin Grimes appeals his convictions on four counts of forgery. He contends the court erred by allowing the State to amend its information on the eve of trial. He also contends the trial court improperly continued his trial date over his objection, which violated his speedy trial rights under the constitution and by court rule. Finding no error, we affirm.

FACTS

Mr. Grimes was arrested for passing counterfeit payroll checks. He confessed upon his arrest. He was charged with four counts of forgery and three counts of second degree theft.

Mr. Grimes was arraigned on July 22, 2004. His trial was scheduled for August 30. On August 27, the court continued Mr. Grimes' trial until September 13, due to ongoing negotiations. On September 10 the trial was continued to September 27 because defense counsel was going to be out of state and due to a judicial conference. Another continuance was granted on September 24 setting the trial for October 25 because defense counsel was not ready for trial.

On October 6, Mr. Grimes moved to dismiss the charges for a violation of his speedy trial rights. The court denied the motion after oral argument on October 14.

In a pretrial hearing on November 17, the State moved to amend the information. The trial court allowed the amendment of the information on the forgery charges, but denied the motion with respect to the second degree theft counts. As a result, Mr. Grimes was tried on only the forgery charges.

Mr. Grimes' trial began on November 17. An officer testified as to Mr. Grimes' confession: that Mr. Grimes obtained a payroll check from his girl friend, which he gave to another person who copied it and prepared counterfeit checks payable to Mr. Grimes with an amount, and then Mr. Grimes signed the checks and cashed them. At trial Mr. Grimes claimed he falsely confessed to the officer to protect his girl friend and children.[1]

[1] Mr. Grimes stated, "I made mention to the officer that if he let [my girl friend] go, that I would tell them whatever they wanted to know . . . [s]o my girlfriend [sic] wouldn't go to jail and [Child Protective Services] come and take the kids because both parents were incarcerated." Report of Proceedings (Nov. 18, 2004) at 89.

He told the jury that what actually happened was that he was hired by a friend of a friend—who ultimately turned out to be the counterfeiter—to work on some trucks. Mr. Grimes claimed that he was led to believe that his recruiter worked for the company named on the checks and he thought he was being paid legitimately through that business with the checks for his work on the trucks. The jury was instructed that it could convict Mr. Grimes of forgery only if the State proved that he "possessed or offered or disposed of or put off as true" the payroll checks knowing they were falsely made, completed, or altered. Clerk's Papers at 49-52. Mr. Grimes was convicted on all four counts.

DISCUSSION

a. Amendment of the Information

Mr. Grimes was initially charged in the information on the forgery counts under RCW 9A.60.020(1)(a) (to falsely make, complete, or alter a written instrument). The information was amended to charge the alternate means of committing forgery of RCW 9A.60.020(1)(b) (to possess, utter, offer, dispose of, or put off as true a written instrument which is known to be forged). Mr. Grimes contends that because he had formulated a defense on the originally charged means, charging alternative means at the time of trial was unfair.

We review the trial court's grant of a motion to amend an information for abuse of discretion. *State v. Brett*, 126 Wn.2d 136, 155, 892 P.2d 29 (1995). A trial court may

allow the amendment of the information at any time before the verdict as long as the "substantial rights of the defendant are not prejudiced." CrR 2.1(d). Mr. Grimes bears the burden of demonstrating prejudice under CrR 2.1(d). *State v. Hakimi*, 124 Wn. App. 15, 26-27, 98 P.3d 809 (2004) (citing *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982)), *review denied*, 154 Wn.2d 1004 (2005).

Notably, Mr. Grimes did not seek a continuance, which is persuasive evidence of the lack of surprise and prejudice. *Gosser*, 33 Wn. App. at 435. Mr. Grimes claims that he did not move for a continuance because he had no confidence it would be granted since he had unsuccessfully moved for a continuance of another forgery trial earlier that same week. The futility of the request—in terms of the likelihood of its success—is not part of the analysis. "If defendant was misled or surprised by the amendment of the information she was entitled to move for a continuance to secure time to prepare her defense." *State v. Brown*, 74 Wn.2d 799, 801, 447 P.2d 82 (1968). The request for a continuance gives some indication that the defense truly needed additional time to prepare a defense in light of the amendment. *See State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987).

"Where the principal element in the new charge is inherent in the previous charge and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment." *Gosser*, 33 Wn. App. at 435. Such is the case with the amendment here.

See also State v. Schaffer, 120 Wn.2d 616, 622, 845 P.2d 281 (1993) (amendment where new theory presented in the amended information arose out of the same general factual circumstance); *State v. Richards*, 3 Wn. App. 382, 383, 475 P.2d 313 (1970) (trial court did not err in allowing an amendment of the information to include an additional means of committing a crime when the defendant had a full opportunity to defend against the charge). Here, as in *Gosser* and *Schaffer*, the facts supporting the alternate theory were contained in the discovery materials. As in *Richards*, Mr. Grimes had an opportunity to cross-examine all of the witnesses with full knowledge of the State's new legal theory.

Mr. Grimes contends that the trial court erred by not complying with a local rule that requires that he receive five days' notice on amendments of this nature. Spokane County LCrR 2.1(d)(1).[2] The court held that the amendments were clerical in nature that

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[2] LCrR 2.1 provides:

"**(d) Amendment.**

"(1) A motion by the State prior to trial, to amend an Information in order to add counts, change the degree of an offense, change the means of commission of an offense, change the date of an offense or add a sentencing enhancement, shall be noted by the State on Form CR-06.300(a) and served on defendant's counsel of record, if represented, or on the defendant if unrepresented. A copy of the proposed amended Information shall be filed and served with the motion. Said motions must be filed and served at least 5 days prior to the hearing of the motion. A copy of the motion shall be given to the bailiff for the Chief Criminal Judge at least one working day prior to the hearing. Motions to amend will be heard by the Chief Criminal Judge on Thursday afternoons unless specially set by the Court. It is the duty of the moving party to notify the bailiff for the Chief Criminal Judge by noon of the Tuesday prior to the hearing to confirm the matter will be heard. A motion to amend an Information to correct simple clerical or grammatical errors is not subject to the time limits set forth in this rule.

resulted from poor proofreading. The correction of clerical errors is not subject to the five-day notice required by the local rule. LCrR 2.1(d)(1).

Mr. Grimes asserts that the error was not truly clerical in nature. The error at issue here is similar to one claimed to have been made by the court for which correction is sought under CR 60. The court views a clerical error in a CR 60 context as "an error or mistake made by a clerk or other judicial or ministerial officer in writing or keeping records; it does not include an error made by the court itself." *Barros v. Barros*, 26 Wn. App. 363, 365, 613 P.2d 547 (1980). Thus, a court may not use a nunc pro tunc order to correct its failure to act, even if to correct an oversight. *Id.* The clerical nature of the error in the information here is supported by the record.

The prosecutor who filed the charges informed the court, "I actually made the charging decision . . . and requested certain charges be filed and certain language be used. I am not sure how the typographical errors occurred but they did on [two] files." Report of Proceedings (RP) (Nov. 15, 2004) at 13. The trial judge did not take the errors lightly: "Not to be picky about this, but isn't there a process to proof read these things way before we get to the arraignment?" *Id*. at 14. The court then observed, "[i]t seems pretty evident that what we have is a situation where the formerly assigned deputy prosecutor, for

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"(2) A motion to amend an Information during, or after, the trial has commenced is governed by CrR 2.1(d)."

whatever reason, apparently just didn't proof read the information before she filed it back in May, several months ago. The court notes that there are two kinds of amendments, generally speaking, in these kinds of situations; those which are more in the way of substance and those which are more in the nature of a clerical error." RP (Nov. 17, 2004) at 12. It ultimately held, "[t]he amendments which are sought as to the four forgery counts would be more in the nature of clerical, in the sense that one of the alternative means was not charged." *Id*. Under these circumstances, charging the alternate means was a clerical error.

In the context of an ineffective assistance of counsel claim, Mr. Grimes contends in a statement of additional grounds for appeal that defense counsel was deficient for his failure to request a continuance when the State moved to amend the information. To show ineffective assistance of counsel, Mr. Grimes must prove counsel's performance was deficient and the deficiency caused him prejudice. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Counsel's performance is deficient when it falls "'below an objective standard of reasonableness'" under prevailing professional standards. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 742, 16 P.3d 1 (2001) (quoting *Strickland*, 466 U.S. at 688). "'The reasonableness of counsel's actions may be determined or substantially influenced

by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.'" *In re Pers. Restraint of Jeffries*, 110 Wn.2d 326, 332-33, 752 P.2d 1338 (1988) (quoting *Strickland*, 466 U.S. at 691).

In addition to the right to effective assistance of counsel, an accused also has a constitutional right "'to at least broadly control'" his own defense. *Id.* at 334 (quoting *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983)). Here, the record shows that Mr. Grimes expressly directed his counsel not to continue his trial. This contradicts his current argument. Moreover, Mr. Grimes strongly promoted his right to a speedy trial. His counsel respected and advocated that position on his behalf. Because the record shows Mr. Grimes expressed his desire to a speedy trial and his resistance to delay, he cannot show that his counsel's actions fell below an objective standard of reasonableness given his constitutional right to control his own defense.

Mr. Grimes argues that he was prejudiced by counsel's ill preparation. To demonstrate prejudice, a defendant must show that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting *Strickland*, 466 U.S. at 694). Here, Mr. Grimes' defense was that he came by the checks legitimately, from honest work, and that he had no reason to believe there was anything

wrong with the checks. If the jury believed his defense, it would not have convicted him of possessing, offering, disposing of, or putting off as true the payroll checks knowing they were counterfeit. Mr. Grimes does not argue that a delay would have made it possible to produce other evidence to substantiate his defense. Further, his confession belies his version. Mr. Grimes does not show a reasonable probability that a continuance would have led to a different verdict. Thus, he does not establish prejudice.

In addition, making a motion to continue is a tactical decision that rests with the attorney. *State v. Wilkinson*, 12 Wn. App. 522, 527 n.8, 530 P.2d 340 (1975). "If defense counsel's conduct can be characterized as legitimate trial strategy, it cannot serve as a basis for a claim of ineffective assistance of counsel." *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991).

b. Speedy Trial

Speedy trial rule. Because Mr. Grimes was in custody, court rules require that he be tried within 60 days of his arraignment unless time is excluded or extended by law. Former CrR 3.3(c), (d), (g) (2001). Motions to continue the trial may be granted when "required in the administration of justice and the defendant will not be substantially prejudiced in the presentation of the defense." Former CrR 3.3(h)(2). Certain continuances are excluded from computing the time for trial. Former CrR 3.3(g)(3), (h). For the period to be excluded, the motion must be made before the time for trial has

expired, and the court must state on the record or in writing the reasons for the continuance. Former CrR 3.3(h)(2).

Here, Mr. Grimes was arraigned on July 22, 2004. On August 27, the court continued Mr. Grimes' trial from August 30 until September 13. On September 10 the trial was continued to September 27. On September 24, a trial continuance was granted until October 25. Thus, on the 36th day of the speedy trial clock, a number of continuances were granted that excluded the time for speedy trial up to October 25. The trial began on November 17, on the 59th day of the speedy trial clock.[3] Mr. Grimes was tried within the speedy trial period required by court rule.

Mr. Grimes further claims that the court erred by allowing the continuances. A trial court's decision on a motion for continuance will not be disturbed on appeal absent a showing of manifest abuse of discretion. *State v. Ford*, 125 Wn.2d 919, 926, 891 P.2d 712 (1995); *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984). An abuse of discretion occurs when a court relies on untenable grounds or untenable reasons. *State v. Teems*, 89 Wn. App. 385, 388, 948 P.2d 1336 (1997).

[3] Mr. Grimes asserts that the trial started on November 18. A trial is commenced for speedy trial purposes when the case is assigned or called for trial and the trial court hears and disposes of preliminary motions. *State v. Carson*, 128 Wn.2d 805, 820, 912 P.2d 1016 (1996). Here, the court heard a suppression motion, the motion to amend, and motions in limine on November 17, and then selected the jury. The trial commenced on November 17.

The court's first continuance was based on plea negotiations. The next continuance was requested because defense counsel was going to be out of state and due to the judicial conference.[4] The last continuance was granted because defense counsel was not ready. It appears that the defense, at a minimum, played a role in the request for each continuance. Mr. Grimes cannot now complain that the requests were granted.

Mr. Grimes asserts that defense counsel cannot waive speedy trial on behalf of the accused. He relies on a portion of *State v. Franulovich*, 18 Wn. App. 290, 567 P.2d 264 (1977), which he asserts holds that "the defense does not have 'carte blanche' to waive speedy trial rules on behalf of a client." Appellant's Br. at 12. That portion of the opinion merely quotes a California Supreme Court case as consistent with *State v. Williams*, 87 Wn.2d 916, 557 P.2d 1311 (1976), and holds that counsel is not precluded from waiving a procedural right. *Franulovich*, 18 Wn. App. at 293. The quoted portion of the opinion upon which Mr. Grimes relies has been recognized as dicta. *State v. Thomas*, 95 Wn. App. 730, 736, 976 P.2d 1264 (1999).

It is well settled that a defendant's speedy trial right is a procedural right that defense counsel may waive, over the defendant's objection, to ensure effective

[4] *See also State v. Flinn*, 154 Wn.2d 193, 200-01, 110 P.3d 748 (2005) (holding that a judicial conference is similar to court congestion, but because it was not the sole reason for the State's continuance the court did not abuse its discretion in granting a five-week continuance).

representation and a fair trial. *State v. Finch*, 137 Wn.2d 792, 806, 975 P.2d 967 (1999) (citing *State v. Luvene*, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995); *Campbell*, 103 Wn.2d at 15; *State v. George*, 39 Wn. App. 145, 692 P.2d 219 (1984); *State v. Fanger*, 34 Wn. App. 635, 663 P.2d 120 (1983); *State v. Cunningham*, 18 Wn. App. 517, 569 P.2d 1211 (1977); *Franulovich*, 18 Wn. App. 290).

Mr. Grimes also argues that he should have had the option to proceed with an unprepared lawyer. As noted in *Campbell*, allowing him to proceed would only lay the groundwork for an ineffective assistance of counsel claim. *Campbell*, 103 Wn.2d at 15. Because having a trial within the time prescribed by CrR 3.3 is not a constitutional mandate, the interests of effective assistance of counsel generally outweigh those of a speedy trial. *Id.*

Mr. Grimes relies on *State v. Heredia-Juarez*, 119 Wn. App. 150, 79 P.3d 987 (2003). There, Division One of this court found the trial court did not abuse its discretion by granting a continuance of the trial to accommodate a prosecutor's scheduled vacation. The court determined that the continuance was justified because (1) the defendant had earlier requested a continuance that caused the conflict; (2) the case was complex; (3) because of the nature of the crime, it was necessary to establish a rapport with the victims, and reassignment of the case to a different prosecutor might not be favored; and (4) the defendant did not claim he was prejudiced by the short delay. *Heredia-Juarez*,

119 Wn. App. at 155-56. Mr. Grimes distinguishes that case from his on the facts and argues that his case should be viewed favorably because it involves a defense attorney and he has a right to a competent defense. As the State points out, *Heredia-Juarez* does not effectively support his position because the focus of the case is too narrow. The court in *Heredia-Juarez* set out to clarify *State v. Kelley*, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992), a case that court previously authored, and to decide "whether *Kelley* imposes a per se requirement that the State reassign the case to the next most available prosecutor." *Heredia-Juarez*, 119 Wn. App. at 154.

Mr. Grimes further asserts that former CrR 3.3(h)(2) requires that a continuance be made on a motion and no motion was made in this case. But Mr. Grimes did not object to the continuances or the procedure used to obtain them below; instead, he agreed to each continuance. He therefore waived his right to raise the issue on appeal. RAP 2.5(a); *see State v. Smith*, 104 Wn.2d 497, 707 P.2d 1306 (1985).

Constitutional delay. A criminal defendant's right to a speedy trial is guaranteed by both our federal and state constitutions. U.S. Const. amend. VI; Const. art. I, § 22. Unlike the court rule, "[t]here is 'no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months.'" *State v. Carson*, 128 Wn.2d 805, 821, 912 P.2d 1016 (1996) (quoting *Barker v. Wingo*, 407 U.S. 514, 523, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)). "[T]he constitutional right to speedy trial is not

violated at the expiration of a fixed time, but at the expiration of a *reasonable* time." *State v. Monson*, 84 Wn. App. 703, 711, 929 P.2d 1186 (1997) (citing *State v. Higley*, 78 Wn. App. 172, 184-85, 902 P.2d 659 (1995)).

In determining whether there was an unconstitutional delay the court considers the length of the delay, the reason for the delay, whether the defendant asserted the right, the prejudice to the defendant, and such other circumstances as may be relevant. *State v. Whelchel*, 97 Wn. App. 813, 823-24, 988 P.2d 20 (1999) (quoting *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989) (quoting *Barker*, 407 U.S. at 533)).

Here, the length of the delay was less than four months from the arraignment. The reasons for the delay—plea negotiations, defense counsel's absence, and defense counsel's preparedness—all benefited Mr. Grimes. Mr. Grimes objected, but not until after the last continuance was granted and he moved to dismiss for a violation of his speedy trial rights. Finally, Mr. Grimes does not show prejudice. He argues that the delay in itself was prejudicial. But the delay was beneficial when considering the reasons.

CONCLUSION

The court did not err in amending the information. Mr. Grimes' speedy trial rights were not violated and the court did not err by continuing the trial date. We affirm.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, A.C.J.

WE CONCUR:

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Brown, J.

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Kato, J.